SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0053

SAVERIO ZIRILLI — Applicant

v

THE QUEEN — Respondent

JUDGES:	McLEISH and WEINBERG JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	22 September 2020
DATE OF JUDGMENT:	2 October 2020
MEDIUM NEUTRAL CITATION:	[2020] VSCA 261 First Revision: 5 October 2020

CRIMINAL LAW – Bail pending appeal – 'Exceptional circumstances' required to be shown – Appeal against conviction based on discovery that applicant's former counsel (on bail application and special mention) was, at the time, acting as a police informer in relation to the drug offences of which applicant was ultimately convicted – Concession by applicant that reasonable prospects of success, alone, insufficient to constitute exceptional circumstances – Need, at least, for strong prospects of success – Novel case with attendant difficulty in assessing prospects of success – Prospects on two of three charges no more than reasonable – Even success in relation to most promising charge would leave intact substantial non-parole period to be served – *Cvetanovski v The Queen* [2020] VSCA 126, distinguished – Exceptional circumstances not made out – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr M Gumbleton with Mr A V Chernok and Mr M Murphy	Nicholas James Lawyers
For the Respondent	Ms R J Sharp with Mr M R Wilson	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

McLEISH JA
WEINBERG JA:

1 On 23 March 2020, Saverio Zirilli ('the applicant') filed an application for leave to appeal against conviction on the sole ground that a substantial miscarriage of justice had occurred by Victoria Police's use of defence counsel, Nicola Gobbo, as a police informer, to secure a conviction against him.[1] That application has not yet been heard and, for reasons that will become apparent, may not be able to be heard for some considerable time.

2 On 22 September 2020, this Court heard an application for bail pending appeal, which of course, requires the applicant to show 'exceptional circumstances'.[2]

3 By way of introduction, on 7 December 2011, the applicant pleaded guilty in the Trial Division, before King J, to one charge of conspiracy to traffic in a commercial quantity of a controlled drug (MDMA), one charge of trafficking in a commercial quantity of a controlled drug (MDMA), and one charge of attempting to possess a commercial quantity of a controlled drug (cocaine). His plea was heard, together with that of his co-offender, Pasquale Barbaro.

4 On 23 February 2012, the applicant was sentenced as follows:

5 Charge on 6 Indictment	**7 Offence**	**8 m**	**9 Maximum e**	**10 Cumulation**
11 1	12 Conspiracy to traffic in a commercial quantity	13 14	Life 5 years	16 Ordered to commence 6 years after the

[1] That application for leave to appeal foreshadows a further ground of appeal arising out of what the applicant suspects to have been the conduct of his former solicitor, Joseph 'Pino' Acquaro, in informing to Victoria Police about the applicant during the time that Mr Acquaro represented the applicant in relation to the very drug matters that are the subject of the proposed appeal.

[2] See generally *Re Zoudi* (2006) 14 VR 580; [2006] VSCA 298.

		of a controlled drug [ss 11.5(1) and 302.2(1) — *Criminal Code* (Cth)]			base sentence commences (effect of 9 years' cumulation)
17	2	Trafficking in a commercial quantity of a controlled drug [s 302.2(1) — *Criminal Code* (Cth)]	Life	15 years	Ordered to commence 2 years after the base sentence commences (effect of 4 years' cumulation)
18	3	Attempt to possess a commercial quantity of a controlled drug [ss 11.1(1), 11.2(1) and 307.5(1) — *Criminal Code* (Cth)]	Life	13 years	Base
19	**Total effective sentence:**		20	26 years' imprisonment	
21	**Non-parole period**:		22	18 years	
23	**Pre-sentence detention declared:**		24	102 days	
25	**Section 6AAA statement**:		26	30 years' imprisonment with a non-parole period of 24 years	

27 For the reasons that follow, we are not persuaded that the applicant has demonstrated exceptional circumstances that would warrant the grant of appeal bail.

Background facts

28 It is necessary to set out briefly the circumstances surrounding the commission of the offences. In particular, it is necessary to outline Ms Gobbo's involvement in the applicant's convictions.

29 As is now well known, at various times between 1995 and 2009, Ms Gobbo was a registered human source, providing information to Victoria Police. During this time,

she was a legal practitioner, having first worked as a solicitor, and then a barrister. She informed on a number of persons with whom she associated in her capacity as a legal practitioner. Those persons included her then clients.

30 Between August 2008 and April 2009, some 33 persons were arrested and charged as a result of three interrelated investigations into large scale drug-trafficking. These investigations were codenamed Operation Bootham Moko, Operation Inca, and Operation Cardinia.

31 Operation Bootham Moko was conducted by the Australian Federal Police ('AFP'). It related to the 2007 importation into Melbourne of more than 15 million MDMA tablets (which weighed in excess of 4.4 tonnes).[3] The drugs were concealed in tomato tins, consigned from Naples, Italy.[4]

32 Operation Inca was a joint operation of the AFP, Victoria Police, the Australian Crime Commission ('ACC'), and the Australian Taxation Office ('ATO'). That operation concerned, among other things, the trafficking, between February 2008 and May 2008, of some 1.2 million MDMA tablets, amounting to some 50 kilograms pure ('Operation Inca A'). It also involved a conspiracy, in July 2008, to import some 99.9 kilograms of cocaine pure, concealed in a shipment of Colombian coffee beans ('Operation Inca C').

33 Operation Cardinia involved further trafficking of MDMA. It did not lead to any charges being brought against the applicant.

34 Key persons of interest in Operations Bootham Moko and Inca included Mr Barbaro, Rob Karam, John Higgs, and the applicant, among others.

35 The prosecution case against the applicant relied upon information collected from telephone intercepts, listening devices, covert surveillance, mobile phone analysis, and seized financial records. Two listening devices were of particular importance to

[3] This was, at the time, the largest quantity of MDMA ever sought to be imported into any country in the world.

[4] Commonly referred to as the 'Tomato Tins' importation.

investigators. One was installed in a room at the Pacific International Apartments, in Melbourne. The other was installed in the Carlton North townhouse occupied by Mr Barbaro and his girlfriend. Those devices recorded a number of incriminating conversations regarding the offending the subject of Operations Bootham Moko and Inca.

36 In June 2007, Mr Karam was facing trial in the County Court on charges relating to the importation, in 2005, of 1.2 tonnes of MDMA. Ms Gobbo appeared as junior counsel for Mr Karam in that trial, which ran until 10 July 2007, when the jury acquitted him of those charges.

37 On the morning of 5 June 2007, Mr Karam provided a number of documents to Ms Gobbo for safekeeping. Those documents included a bill of lading containing information regarding a forthcoming shipment to Melbourne of tinned tomatoes from Italy. That bill of lading was in Italian.

38 On that day, Ms Gobbo photocopied those documents and provided the copies to her handlers at Victoria Police. She informed them that the documents related to a shipment that had been arranged by one of Mr Karam's associates. Further, she assisted police with translating the bill of lading from Italian to English. She, in effect, provided them with the vessel name, container number, port of origin, and departure date.

39 On 15, 17, and 18 June 2007, Ms Gobbo's Victoria Police handlers instructed her to obtain further information from Mr Karam. In particular, they asked her to report on meetings that Mr Karam might hold with associates, and to provide information about those persons. She complied with those requests.

40 On 19 June 2007, Ms Gobbo provided her handlers with further information regarding the movements of the ship holding the container, and precisely when it was expected to arrive in Melbourne.

41 On 20 June 2007, Ms Gobbo's handlers informed a member of Australian Customs of the impending arrival of the Tomato Tins shipment. During that conversation, Ms Gobbo's handlers told Australian Customs that the AFP were not to be told the source of the tip off.[5] It had been agreed that the two agencies would proceed on the false narrative that Australian Customs had, somehow, identified the container by their own means.

42 We interpolate to note that evidence before the Royal Commission into the Management of Police Informants makes it clear that Ms Gobbo's handlers had acknowledged that the Tomato Tins shipment would not have come under suspicion had it not been for the information provided to Victoria Police by Ms Gobbo.

43 On 21 June 2007, Ms Gobbo informed her handlers that Mr Karam had met with 'some Italians from Griffith' the previous day.[6] Ms Gobbo said that the purpose of the meeting had been to organise the next importation. Until this point, and unlike some of his co-accused, investigating authorities had not been aware of the applicant's identity, or possible involvement in drug offences. He had never previously been the subject of any police surveillance, and had no prior convictions.

44 On 27 June 2007, Ms Gobbo told one of her handlers that she had been informed by Mr Karam that he and Mr Higgs were going to meet 'the Italian boys from Griffith' at the Pacific International Apartments. She told her handlers that 'the Italian boys from Griffith' were booked to stay there 'for the week'. That information was shared with members of the Drug Taskforce of Victoria Police. At some stage shortly thereafter, Victoria Police provided that information to the AFP. The following day, the Tomato Tins shipment was intercepted and seized by Australian Customs.

[5] It was submitted during argument that Victoria Police were 'at pains, by way of a deliberate strategy' to ensure that the AFP were not aware of the source of the information. Counsel submitted that Victoria Police had informed the ACIC and Australian Customs that the information had come from a registered human source, but that they had entered into agreements with those agencies that the AFP would not be told of the source of that information.

[6] This was a reference to Mr Barbaro and the applicant, who were both from Griffith, New South Wales.

45 On 30 June 2007, members of the AFP attended the Pacific International Apartments. They did not interact with the applicant and Mr Barbaro, but obtained information from hotel staff to confirm their identities.

46 On 2 July 2007, the AFP covertly installed a number of listening devices in the room in which the applicant and Mr Barbaro were staying. Those devices captured incriminating conversations and the names of other persons involved in the Tomato Tins importation.

47 By 5 July 2007, the AFP had focused their investigation on four main targets: Mr Barbaro, Mr Karam, Mr Higgs, and the applicant.

48 The prosecution case with regard to the charges resulting from Operation Inca was that, following the interception of the Tomato Tins shipment, Mr Barbaro was under great pressure to repay his debt to the Italian suppliers of the drugs seized. He had sought to do this through, inter alia, trafficking a further large amount of MDMA (the 1.2 tonnes representing Operation Inca A), and by trafficking cocaine (Operation Inca C).

49 In that regard, the prosecution relied on a number of incriminating conversations captured by the surveillance devices installed at the Pacific International Apartments, and the Carlton North townhouse.

50 On 8 August 2008, the applicant, along with many others, was arrested and charged with the offences giving rise to the application for leave to appeal. On that day, Ms Gobbo provided her handlers with the phone numbers of several figures involved in the trafficking operations. Those phone numbers had been provided to Ms Gobbo by her clients.

51 In an audio recording of a conversation between Ms Gobbo and her handlers on 1 September 2008, she said that she would be 'morally, ethically and legally conflicted' in representing 'everyone' arrested on 8 August.

52 On 9 September 2008, Ms Gobbo appeared for the applicant at a special mention, and

bail application. The applicant was granted bail subject to stringent conditions. He remained on bail for the next three years, until he was sentenced.

53 As indicated, the applicant eventually pleaded guilty after having considered the weight of the evidence against him. He was sentenced as indicated above.[7] Ms Gobbo did not, ultimately, appear for the applicant during the course of various preliminary hearings, or on his plea.

54 Throughout the course of the various court proceedings relating to these charges, Mr Acquaro, who was shot and killed in 2016, acted as the applicant's instructing solicitor. He maintained carriage of the matter from beginning to end, all the way up to an appeal against sentence, in the High Court.[8]

The procedural history of this application

55 As indicated, on 23 March 2020, the applicant filed a notice of application for leave to appeal against conviction, out of time. On 30 April 2020, the Court granted that extension of time.

56 On 1 April 2020, the applicant filed four applications for orders pursuant to s 317 of the *Criminal Procedure Act 2009*.[9] He sought the production of documents from the Chief Commissioner of Victoria Police ('the Chief Commissioner'), the Commissioner of the AFP, the Commissioner of the Australian Border Force,[10] and the CEO of Australian Criminal Intelligence Commission ('ACIC').[11]

57 On 12 June 2020, Judicial Registrar Irving made orders granting the s 317 application. The relevant orders are set out as follows:

7 See [3] above.

8 His application for special leave was granted. The appeal, however, was dismissed. See generally *Barbaro v The Queen* (2014) 253 CLR 58; [2014] HCA 2.

9 That section provides: 'For the purposes of this Part, the Court of Appeal may order the production of any document, exhibit or other thing connected with the proceeding if the Court of Appeal considers that it is in the interests of justice to do so.'

10 Formerly known as Australian Customs.

11 Formerly known as the Australian Crime Commission.

(1) Pursuant to s 317 of the *Criminal Procedure Act 2009* (Vic), the Chief Commissioner produce documents, exhibits, or other things connected with the proceeding as follows:

(a) All documents relating to information exchanged between registered police informer, Nicola Gobbo (Human Source 3838) and Victoria Police between 21 May 2007 and 3 July 2007, concerning the [shipping] container … allegedly containing tomato tins on board vessel *MV Monica* from Naples, Italy …

(c) All documents relating to information exchanged between registered police informer, Nicola Gobbo (Human Source 3838) and Victoria Police between 8 October 2006 and 16 December 2008 …

(e) All documents relating to information exchanged between the Applicant's solicitor, Joseph Acquaro (deceased), and Victoria Police between 8 October 2006 and 16 December 2008 concerning:

(i) the Applicant;

(ii) the shipment of container MEDU1250218 containing tomato tins on board vessel *MV Monica* from Naples, Italy; or

(iii) drug trafficking, namely the second and third charges the Applicant pleaded guilty to, and was sentenced on 23 February 2012, being trafficking a commercial quantity of MDMA contrary to section 302.2(1) of the Criminal Code and attempting to possess a commercial quantity of cocaine contrary to sections 11.1(1), 11.2(1) and 307.5(1) of the Criminal Code.

58 On 13 July 2020, the applicant filed an application for bail pending appeal, and several accompanying affidavits, affirmed by his solicitor, and one affirmed by his wife, in support. The application was initially listed to be heard on 12 August 2020. However, on the preceding day, the applicant sought to adjourn the hearing of that application. The respondent did not oppose the adjournment.

59 On 10 September 2020, the Chief Commissioner filed his own application for a ruling that any documents pertaining to Mr Acquaro, and whether he had been an informer in relation to the applicant, were subject to public interest immunity ('PII') and, therefore, immune from disclosure and production. Further, the Chief Commissioner noted that it was the general policy of Victoria Police to neither confirm, nor deny, whether any person had been, or was, a police informer. The applicant then informed the Court that he wanted to be heard on the application brought by the Chief Commissioner.

60 The claim by the Chief Commissioner for PII regarding Mr Acquaro is to be heard by a Court differently constituted at some stage in the near future. The applicant's counsel was invited to consider whether to adjourn this application for appeal bail until after that matter had been resolved, on the basis that any suggestion that Mr Acquaro, while acting as the applicant's solicitor, had been informing on his own client might be relevant to the question whether exceptional circumstances warranting bail had been established. Counsel determined that the bail application should, nonetheless, proceed, purely on the basis of Ms Gobbo's involvement, without the Acquaro matter having been resolved.

Bail application

61 The applicant based his application for bail primarily upon the strength of the proposed appeal. Counsel submitted that exceptional circumstances arose from the combination of what he contended were very strong prospects of success, the applicant's acceptably low risk of absconding and the delay that would be entailed in hearing the appeal as a result of the need to resolve the issues concerning Mr Acquaro.

62 However, counsel for the applicant candidly, and properly, conceded that if the Court were to be satisfied only that the appeal was reasonably arguable, the application for bail must be refused. For that reason, we turn immediately to consider the strength of the proposed appeal. Necessarily, we do so in a provisional manner only, without having had the benefit of full argument.

63 As matters stand, there is a single proposed ground of appeal, concerning the role played by Ms Gobbo. For the reasons set out earlier, the position regarding Mr Acquaro is not yet resolved and that issue must be left to one side.

64 Counsel for the applicant submitted that there was a fundamental inconsistency between Ms Gobbo's status as an officer of the Court, owing paramount duties to the Court and to her clients, and her status as a registered human source for Victoria

Police, acting at the behest and direction of her handlers. It was said that this situation gave rise to an inescapable conflict of duty on the part of Ms Gobbo, which had been concealed from the Court and the applicant. As a result, the independence of the Court had been compromised and it had effectively been used as an arm of the Executive. It was said that this was an abuse of the Court's processes which had given rise to a substantial miscarriage of justice.

65 In the present matter, it was submitted, an officer of the Court had supplied the foundation upon which the whole case against the applicant was erected. This was said to include, not only the charge arising out of the Tomato Tins importation (charge 1), but also the subsequent charges. The events the subject of those charges were causally linked to the failure of the Tomato Tins importation, and the applicant was said to have been connected to them by police only as a result of his having first come to their attention in connection with charge 1 as a result of the actions of Ms Gobbo.

66 Counsel submitted that, had the true situation regarding Ms Gobbo been known before trial, it was inevitable that the applicant would have sought and been granted a permanent stay of all charges against him on the above basis. The fact that the conduct had been concealed from the Court and from the applicant had deprived him of the opportunity of seeking such a stay, giving rise to a substantial miscarriage of justice. Counsel was at pains to make clear that the appeal did not depend on the precise role played by Ms Gobbo when she was acting for the applicant, but on the undisclosed situation of fundamental conflict in which she was placed. Nor was the appeal premised on the exclusion of unlawfully or improperly obtained evidence under s 138 of the *Evidence Act 2008*.

67 As counsel accepted, the proposed appeal advances a novel argument. That is no criticism, as the circumstances themselves are novel. It does, however, make assessment of the argument's likely strength, even on a provisional basis, more difficult.

68 None the less, we are prepared to accept, for the sake of argument only, that the argument has at least reasonable prospects of success in respect of charge 1. It is not necessary, for the reasons that follow, to decide whether, as the applicant submitted, those prospects are so high that the appeal is bound to succeed in respect of charge 1 or whether this would amount of itself to exceptional circumstances.[12] Even if we were to form that provisional opinion as to prospects in relation to charge 1, on any view the position is different in respect of charges 2 and 3. Ms Gobbo's connection with the subject matter of those charges is considerably weaker than in the case of charge 1. While it may be reasonably arguable that the position of conflict identified by the applicant infected his convictions on those charges as well, we do not think, on the present material, that the prospects can be placed any higher than that. In short, the impact of the identified conflict on the applicant's convictions on charges 2 and 3 is more remote, by a considerable degree, than is the case with charge 1.

69 The sentences on charges 2 and 3 represent 17 years of the applicant's total effective sentence of 26 years. The consequence of the above conclusion is that we cannot say that the proposed appeal's prospects are other than merely reasonable in respect of those charges. Success in relation to charge 1 alone would be likely to leave intact a non-parole period of some years still to run.[13] That situation can be contrasted with the circumstances which led this Court to grant bail in *Cvetanovski v The Queen*,[14] on the basis that the imminent expiry of the non-parole period meant that success on the appeal would be rendered effectively meaningless.

70 Accordingly, the applicant has not established that the prospects of the proposed appeal are so strong as to require a grant of bail. Instead, a grant of bail would see the applicant released during a non-parole period being served on charges as to which the prospects of success on appeal are so far shown to be no more than reasonable.

12 This Court has not decided the latter question: see *DBA v The Queen* [2008] VSCA 138, [17] (Maxwell P and Nettle JA); *Momcilovic v The Queen* [2008] VSCA 183, [7] (Maxwell P and Weinberg JA); *Gant v The Queen* [2016] VSCA 340, [23] (Weinberg and Priest JJA).

13 The non-parole period imposed in respect of all three charges was 18 years.

14 [2020] VSCA 126, [8] (Maxwell P, Beach and Weinberg JJA).

71 In light of the applicant's acceptance that his application for bail depended on establishing that the appeal had very strong prospects of success, it is unnecessary to address the remaining issues that would have arisen on the application if he had established the strength of his proposed appeal.

72 For these reasons, the application for bail is refused.

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